# In the Supreme Court

of the

## United States

October Term, 1939

No. 92

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| Otho G. Bell (1), William A. Coward (2), Lewis W. Green (3), *Petitioners,* | |
| vs. | |
| The United States, *Respondent.* | |

## BRIEF FOR PETITIONERS.

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# In the Supreme Court
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OCTOBER TERM, 1960

No. 92

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
*Petitioners,*

vs.

THE UNITED STATES,
*Respondents.*

## BRIEF FOR PETITIONERS.

### OPINION BELOW.

The Opinion and Findings of Fact of the United States Court of Claims, filed March 2, 1960, is found in the record at pages 33 to 59.

### JURISDICTIONAL STATEMENT.

This appeal is taken from a judgment of the United States Court of Claims entered on March 2, 1960. Jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended

by the Act of May 22, 1939, 62 Stat. 928 (28 U.S.C. 1255). Rules of Review by this Court of the judgments of the Court of Claims by certiorari, are provided for in Rule 23 of the Rules of the Supreme Court of the United States relating to certiorari (28 U.S.C. Rule 23).

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## STATUTES INVOLVED.

The applicable statutes are:

1. 10 U.S.C. 846 (Appendix A);
2. 50 U.S.C. Appendix 1002-1009, the so-called Missing Persons Act (Appendix B).

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## SPECIFICATION OF ERROR.

1. The lower court erred in that it considered irrelevant and immaterial facts in arriving at its decision.

2. The lower court erred in that it indulged in judicial legislation by interpolating into 10 U.S.C. 846 conditions which do not exist in said statute and which were never intended to exist in said statute.

3. The lower court erred in that it gave an unconstitutional interpretation to 10 U.S.C. 846 and 50 U.S.C. Appendix 1002.

4. The lower court erred in that it interpreted 10 U.S.C. 846 in such a way as to permit the Department of the Army unilaterally and administratively (viz. other than by court-martial) to forfeit retroactively the earned pay of a member of the Armed Services.

5. The lower court erred in that it failed to set any standard by which the Department of the Army could work a unilateral administrative retroactive forfeiture of a serviceman's pay.

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## QUESTIONS PRESENTED.

1. Can the Department of the Army administratively determine that, due to misconduct, a person who has enlisted in the Army and who has not been discharged from the Army, has forfeited his right to pay and allowances?

2. Can the Department of the Army, by its unilateral administrative act (viz., other than by court-martial), legally make a retroactive ruling that a former member of the Army is not entitled to his pay and allowances for a period of active duty, because of his misconduct during a portion of such period?

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## STATEMENT OF CASE.

The following facts have been established by the judgment below, the Commissioner's report or by admissions in the pleadings:

1. *Enlistment.* That each of the petitioners enlisted in the United States Army on the following dates:

OTHO G. BELL, January 29, 1949;
WILLIAM A. COWART, January 7, 1949;
LEWIE W. GRIGGS, August 4, 1949.

2. *Capture.* That each of the petitioners was captured by either the North Korean forces or the Chinese Communist forces in Korea on the following dates:

OTHO G. BELL, November 30, 1950;
WILLIAM A. COWART, July 12, 1950;
LEWIE W. GRIGGS, August 25, 1951.

3. *Rank.* That at the time of capture each of the petitioners was a Private 1st Class.

4. *Promotion.* The records of the Department of the Army show that each of the petitioners was made a Corporal as of May 1, 1953.

5. *Confinement.* Each of the petitioners was confined as a Prisoner of War from the date of his capture until August 5, 1953, when each refused repatriation.

(Note: This fact is taken from Paragraph XV of respondent's answer. Petitioners contend they were Prisoners of War until the date of their discharge.)

6. *Misconduct.* Each of the petitioners at some unknown time after the date of his capture commenced to do various alleged acts of misconduct.

7. *Refusal of Repatriation.* The Korean Armistice was signed on July 27, 1953. Prisoner repatriation began on August 5, 1953. Each of the petitioners refused repatriation and went to Communist China sometime after August 5, 1953.

8. *Discharge.* Each of the petitioners was dishonorably discharged from the United States Army on January 23, 1954.

9. *Pay.* Except for allotments for dependents and insurance, none of the petitioners have received any pay for the period starting some months before their capture to the date of their dishonorable discharges. This includes both regular pay and combat pay.

10. *Voluntary Repatriation.* Each of the petitioners voluntarily returned to the United States in July, 1955, and was confined by the United States Army in San Francisco, California, awaiting trial by General Court-Martial for violation of Article 104 of the Uniform Code of Military Justice.

11. *Release from Confinement.* On November 10, 1955, the petitioners were released from confinement on writs of habeas corpus issued by the United States District Court for the Northern District of California (Otho G. Bell, et al., vs. Robert N. Young, et al., Nos. 34865, 34880 and 34881, United States District Court for the Northern District of California, Southern Division). These writs were issued on the basis of *Toth v. Quarles,* 350 U.S. 11 and *Reid v. Covert,* 354 U.S. 1, in that since the petitioners had been discharged from the Army they were no longer amenable to Court-Martial jurisdiction. Like the *Toth* and *Reid* decisions, the Federal Court did not rule that the petitioners could not be tried, but rather ruled that if they were to be tried, they should be tried in a civilian court where they would enjoy their basic Constitutional guaranties.

12. *Claim for Pay.* On November 8, 1955, the petitioners made claim upon the Department of the

Army for their back pay. On October 2, 1956, the Department of the Army denied the petitioners' claim.

13. *Action Below.* On December 31, 1956, the petitioners filed a petition in the United States Court of Claims for their back pay. On March 2, 1960, the United States Court of Claims entered an opinion in which the majority of the Court denied the right of petitioners to any of their pay.

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**ARGUMENT.**

It is the contention of your petitioners that the facts enumerated in the Statement of Facts are the only relevant and material facts which should be considered by the Court in determining the right of a serviceman to his pay under the military pay statutes here involved.

Your petitioners and the respondent entered into a Stipulation of Facts from which the Commissioner's report was drawn (R.P. 8). This Stipulation of Facts and the Commissioner's Report contain a long list of facts of misconduct attributed to your petitioners. The court below states that "the plaintiffs *admit* that they gave aid and comfort to the enemy" (R.P. 42, emphasis added). This is not accurate. The first paragraph of the Stipulation of Facts reads as follows (R.P. 8):

> "It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth shall, for the purpose of this case, be deemed to have been elicited by competent testimony of witnesses

called by the defendant, and unrebutted by the plaintiffs or their witnesses, and shall constitute a part of the record in this case; provided that either party may offer additional evidence, either by way of testimony or exhibits. Plaintiffs, however, reserve the right to object to the materiality and relevancy of any of the agreed facts hereafter set forth."

Paragraph 7 of the Findings of Fact (R.P. 47) states in part as follows:

"The parties, by their attorneys, entered into a stipulation of record by the terms of which, for the purposes of this proceeding, certain facts were to be deemed to have been elicited from the defendant's witnesses, testifying under oath, without the necessity of calling such witnesses to trial. The plaintiffs did not rebut the facts so elicited and waive the right to testify or to call witnesses to testify in rebuttal of the said facts, although the plaintiffs did reserve the right to object to the materiality and the relevancy of any of the facts."

The petitioners do not admit to the alleged acts of dishonor contained in the Stipulation and the Findings of Fact, but rather demur to them on the grounds that such facts are irrelevant and immaterial in a civil action for military pay provided by statute.

Since the respondent has raised the alleged acts of dishonor as a defense and since the petitioners have contended that they are irrelevant and immaterial, the Court has no alternative but to consider the alleged acts for the limited purpose of determining their

materiality. However, in considering the alleged acts of dishonor for this limited purpose, it would seem that the Court should consider them not as specific criminal acts of dishonor in the light of present-day passions, but should consider such alleged acts in the light of the continuing principles of law[1] governing servicemen and their pay.

Considering such acts in the light of the principle being considered and for the purpose of determining their materiality, such alleged acts cease to be acts of giving aid and comfort to the enemy and become nothing more and nothing less than acts of misconduct, the same as murder, desertion, or insubordination, and if considered for this limited purpose, would lose their identity as specific acts of dishonor in the criminal sense and become simply misconduct in the civil sense.[2] The rule propounded by the court below does

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[1]In its Brief in Opposition to the Petition for Certiorari, the respondent states that "This case presents a relatively narrow and presumably nonrecurrent question of statutory construction" (Brief, page 8). However, in the Court below the respondent used such phrases as ". . . a problem of far reaching importance to the Armed Services and of legal issues that involve statutory construction . . .", (Defendant's Brief to the Court of Claims, page 23). And, "This case is a matter of great importance to all the Armed Services because of the possible effect recovery by plaintiffs would have on personnel now in the service while we are at peace, and more especially on future personnel who may become prisoners of war in a possible future conflict". (Defendant's Brief to the Court of Claims at page 64). And, "It would be a dangerous *precedent* if this court were to hold that plaintiffs are entitled to their pay and allowances in the face of this fundamental breach of their enlistment contracts . . . 11", (emphasis added). (Defendant's Brief to the Court of Claims, page 51).

[2]The respondent has argued both to the Court below (Defendant's Brief to the Court of Claims, page 49) and to this Court (Brief in Opposition, page 8) that the petitioners, by their alleged acts of misconduct, have breached their enlistment contracts. If

not purport to limit its application to any specific type of misconduct, but rather grants to the dispersing officer the authority to forfeit pay for any misconduct. Today the Army claims the right to administratively and unilaterally forfeit pay for one type of misconduct; tomorrow the Army may choose to administratively and unilaterally forfeit the pay for another type of misconduct.

The key question, therefore, is not whether the specific acts of misconduct involved in this case are material and relevant, but whether any acts of misconduct are material and relevant when determining a serviceman's entitlement to pay under a military pay statute. If this is not accepted as the premise, then we get into the "anomalous proceedings" mentioned in *White v. The United States* (infra).

This brief is in nowise intended to attempt to justify or condone the alleged misconduct of the petitioners, if any. This brief is written in the interest of, and on behalf of, all future servicemen who stand in danger of having their pay retroactively checked by the unilateral administrative act of the Commanding Officer or Disbursing Officer who feels that they are guilty of some act of misconduct.

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these acts of misconduct can constitute a breach of an enlistment contract, so could any one of the various other military offenses enumerated in the Uniform Code of Military Justice, 1951 (64 Stat., 126; 50 U.S.C. 698). *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157; *U. S. v. Blanton*, 7 U.S.C.M.A. 664, 23 C.M.R. 128, are but a few of the long line of decisions that have conclusively established the principle that it is impossible for a soldier to abandon his status as a soldier or to breach his enlistment contract.

**IS A SERVICEMAN'S CONDUCT RELATIVE AND MATERIAL TO HIS ENTITLEMENT TO PAY UNDER A SPECIFIC PAY STATUTE?**

10 U.S.C. 846 provides in whole as follows:

> "Every noncommissioned officer and private of the regular Army and every noncommissioned officer and private of any militia or volunteer corps of the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law (R.S. Section 1288)".

Applying the relevant parts of 10 U.S.C. 846 to this case, we have:

| **10 U.S.C. 846.** | **Facts in the Instant Case.** |
|---|---|
| "Every . . . private in the regular Army. . . ." | Each of your petitioners in the instant case was a private first class in the United States Army at the time of his capture. |
| | **Authority:** |
| | 1. "Defendant's Answer. Paragraph 5 (R.P. 4) ". . . and alleges that at such time each of the plaintiffs was a private first class." |
| | 2. "Findings of Fact." Paragraph 4 (R.P. 47) "At the time of their capture, as aforesaid, the plaintiffs were privates first class in the United States Army." |

| 10 U.S.C. 846. | Facts in the Instant Case. |
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| ". . . who is captured by the enemy . . ." | Petitioner, Bell, was captured by enemy forces on November 30, 1950; Petitioner, Cowart, was captured by enemy forces on July 12, 1950; Petitioner, Griggs, was captured by enemy forces on April 25, 1951. |
| | **Authority:** |
| | 1. Defendant's Answer, Paragraph 3 (R.P. 4), admits Paragraph III of plaintiffs' petition (R.P. 1) which states, "plaintiff, Otho G. Bell, was captured in combat by enemy forces in Korea on November 30, 1950; that plaintiff, William A. Cowart, was captured in combat by enemy forces in Korea on July 12, 1950; that plaintiff, Lewie W. Griggs, was captured by enemy forces in Korea on April 25, 1951." |
| | 2. Findings of Fact, Paragraph 3 (R.P. 46, "The plaintiffs, Bell, Cowart and Griggs, were captured by the North Korean and/or Chinese Communist Forces in Korea, along with other United States soldiers, on the respective dates of November 30, 1950; July 12, 1950; and April 25, 1951." |
| ". . . shall be entitled to receive during his *captivity* . . ." (Emphasis added.) | Petitioner, Bell, was in captivity from November 30, 1950, until January 23, 1954; Petitioner, Cowart, was in captivity from July 12, 1950, until January 23, 1954; Petitioner, |

10 U.S.C. 845.

**Facts in the Instant Case.**

Griggs, was in captivity from April 25, 1951, until January 23, 1954.

**Authority:**

1. Defendant's Answer, Paragraph 15 (R.P. 5), "Plaintiffs were among 21 *Prisoners' of War* who had served in the Army in Korea, were *captured*, and in August, 1953, refused to be repatriated and returned to the United States' control when they were *released from prison*. Because plaintiffs refused repatriation when they were *released from prison as Prisoners of War* . . ." (Emphasis added.)

2. Defendant's Answer, Paragraph 5 (R.P. 4), "Denies the balance of the allegations of said paragraph concerning the status of plaintiffs as Corporals *during their captivity*, but admits that during said period, . . ." (Emphasis added.)

3. Findings of Fact, Paragraph 5 (R.P. 47), "Upon their *capture*, as aforesaid, the plaintiffs, Bell and Griggs, were *detained*, respectively, in Prisoner of War Camp No. 5, located at Pyoktong, North Korea, in the Prisoner of War Camp No. 1. The record does not otherwise disclose the place of detention of plaintiff, Cowart." (Emphasis added.)

10 U.S.C. 846.

**Authority:**

4. Findings of Fact, Paragraph 6 (R.P. 47), "The facts so set forth in the stipulation related to the activities of the plaintiffs *while they were detained as Prisoners of War* . . ." (Emphasis added.)

5. Findings of Fact, Paragraph 7 (R.P. 47), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Bell . . ." (Emphasis added.)

6. Findings of Fact, Paragraph 17 (R.P. 52), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Cowart . . ." (Emphasis added.)

7. Findings of Fact, Paragraph 25 (R.P. 55), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Griggs . . ." (Emphasis added.)

8. Findings of Fact, Paragraph 31 (R.P. 57), "With reference to the plaintiffs' assertion *while confined* as POW's . . ." (Emphasis added.)

9. Findings of Fact, Paragraph 33 (R.P. 58), "With reference to the plaintiffs' assertion *while confined as POW's* . . ." (Emphasis added.)

**10 U.S.C. 846.**

". . . the same pay, subsistence and allowance to which he may be entitled while in the actual service of the United States;"

**Facts in the Instant Case.**

On the day of his capture, the petitioner, Bell, had accrued, but unpaid, combat pay due him in the sum of $315.00, and accrued, but unpaid, regular pay due him in the sum of $3.32.

1. Defendant's Exhibit No. 8 to Commissioner's Report[3] (R.P. 62).

"OTHO G. BELL, RA-18-276-618"

"30 Nov. '50—23 Jan. '54"

"Credits"

"Balance Due 30 Nov. '50 $3.32"

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[3]Paragraph 2, page 14, of the Stipulation of Facts, entered into between the parties hereto, provides in part as follows: "If any plaintiff is, or if all plaintiffs are, entitled to recovery in this action, the amount or amounts subject to offsets, will be determined by the General Accounting Office, in conjunction with the Army, or by further proceedings, if the Court so orders."

On May 25, 1959, counsel for defendant sent to counsel for plaintiff a certified photostatic copy of an accounting made by the General Accounting Office, which accounting listed the various "credits" and "debits" of the pay accounts of each of the plaintiffs. On June 1, 1959, counsel for plaintiffs returned the certified photostatic copies of the accounting to the counsel for defendant. On July 1, 1959, counsel for the defendant sent to counsel for the plaintiffs a Stipulation of Damages, based on the aforesaid accounting, and stated in the covering letter: "When the stipulation is submitted to Commissioner Bernhardt, we shall also submit to him to be marked as Defendant's Exhibit No. 9 the certified photostatic copy of the document from the General Accounting Office which you returned to us with your letter of June 1, 1959." On July 7, 1959, counsel for plaintiffs executed and returned to counsel for defendant the Stipulation of Damages. On July 15, 1959, counsel for defendant forwarded the executed Stipulation of Damages to the Commissioner. In the covering letter to the Commissioner, counsel for defendant stated: "We also enclose a certified photostatic copy of the document from the General Accounting Office which is to be marked 'Defendant's Exhibit No. 9.'"

10 U.S.C. 846.

**Facts in the Instant Case.**

Combat Pay 1 Aug. '50—28 Feb. '51 @ $45.00 315.00"

From the date of his capture until the date of his discharge, Petitioner, Bell, had accrued to him, but unpaid, pay, subsistence and allowance in the sum of $7,326.27, less debits in the sum of $6,186.30.

**Authority:**

1. Defendant's Exhibit No. 8 to Commissioner's Report (R. P. 62).

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On the day of his capture, the Petitioner, Cowart, had accrued, but unpaid, combat pay due him in the sum of $180.00 and accrued, but unpaid, regular pay due him in the sum of $39.34.

**Authority:**

1. Defendant's Exhibit No. 6 to Commissioner's Report (R.P. 60).

"WILLIAM A. COWART, RA-14-313-067"

"12 July '50—23 Jan. '54"

"Credits"

"Balance Due 12 Jan. '50 $39.34"

"Combat Pay 1 July '50—31 Oct. '50 @ $45.00 180.00"

From the date of his capture until the date of his discharge, Petitioner, Cowart, had accrued to him, but unpaid, pay, subsistence and allowance in the

10 U.S.C. 846.

**Facts in the Instant Case.**

sum of $5,131.04, less debits in the sum of $4.25.

**Authority:**

1. Defendant's Exhibit No. 6 to Commissioner's Report (R.P. 60).

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On the day of his capture, Petitioner, Griggs, had accrued, but unpaid, combat pay due him in the sum of $585.00 and accrued, but unpaid, regular pay due him in the sum of $63.33.

**Authority:**

1. Defendant's Exhibit No. 7 to Commissioner's Report (R.P. 61).

"LOUIS W. GRIGGS, RA-18-322-825"

"25 April '51—23 Jan. '54"

"Credits"

"Balance Due 25 April '51 $63.33"

"Combat Pay 1 July '50—31 July '51 @ $45.00 585.00"

From the date of his capture until the date of his discharge the Petitioner, Griggs, had accrued to him but unpaid, pay, subsistence and allowance in the sum of $4,060.35, less debits in the sum of $1,901.54.

**Authority:**

1. Defendant's Exhibit No. 7 to Commissioner's Report (R.P. 61).

From the above, it would appear that each of the petitioners has complied with all the conditions of 10 U.S.C. 846 and that each is thus entitled to the pay which the statute allows him.

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THE STATUTE AND ITS PREDECESSORS.

The following important factors should be noted about 10 U.S.C. 846:

1. The first predecessor of 10 U.S.C. 846 was enacted in 1814 as 3 Stat. L. 114, Sec. 14.

2. In the 146 years since this first enactment, the section has been amended and re-enacted a number of times.

3. In the 146 years since this first enactment, the United States has been involved in a number of wars and in each of these wars there have been American Prisoners of War who have misconducted themselves in a manner similar to, or worse than, the alleged misconduct of the plaintiffs.[4]

4. 10 U.S.C. 846 (1952) as quoted above, is valid and subsisting Federal Legislation in and of itself. 50 U.S.C. App. 1002-1009 does not directly or indirectly or by innuendo purport to modify, change or repeal any part of 10 U.S.C. 846.

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[4]Judge Madden, in his dissent, states: "There has never been a war in which some prisoners have not acted contemptibly, in comparison with the conduct of their better-balanced comrades". (R.P. 45). For examples of prisoner misconduct, see *Ex Rel. Hirshberg v. Cooke*, 336 U.S. 210; *Petition of Provo*, 17 F.R.D. 183 and 350 U.S. 857; see also the many cases dealing with Union Prisoners of War who joined the Confederacy during the Civil War.

5. Neither 10 U.S.C. 486 nor any of its predecessors have ever had any type of condition as to conduct, nor made any conduct a condition to entitlement under the act.

6. 10 U.S.C. 846 does not mention the word "status", either as "status as a soldier", "status as a prisoner", "status of captivity", or at all.

7. 10 U.S.C. 846 does not now, and never has, given to the "head of the department concerned" or to anyone else the "authority to make determinations necessary to the administration of the act".

8. 10 U.S.C. 846 does not now, and never has, given to the department or anyone else, authority to determine "status" or "entitlement to pay", or to make any such determination "conclusive".

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STATUTORY CONSTRUCTION.

The lower court, by the purported office of statutory construction, has made several changes in 10 U.S.C. 846. First, it has made good conduct a condition to entitlement under the act. Second, it has given to the department head or his agent the authority to determine whether or not a person is in the "status of a prisoner". Third, it has given to the department head or his agent the authority to change or modify his previous determination. Fourth, it has made such a determination by the department head or his agent conclusive. Neither 10 U.S.C. 846 nor any of its predecessors have ever expressly or impliedly contained any of these conditions or restrictions.

It is respectfully submitted that the lower court is not engaging in the art of statutory construction, but rather is experimenting in the field of judicial legislation. In *U. S. v. Reese,* 92 U.S. 214, the Supreme Court held, at page 221:

> "To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is not part of our duty."

It is respectfully submitted that the lower court is not interpreting an existing statute (viz. 10 U.S.C. 846) but, by the office of interpolation, is enacting a new statute. In *Lewis v. The United States,* 92 U.S. 618 at page 623, this Court held:

> "Neither statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it; not to make it."

Even if we were to disregard the rule of statutory construction which precludes judicial legislation and were to indulge in the evil that it was intended to guard against, we would still arrive at the same inescapable conclusion because of another well known rule of construction. One of the most ancient rules of statutory construction is that the inclusion of express conditions in a statute raises a presumption that Congress intended to exclude all other conditions. This rule is well stated in *Statutory Construction,* Crawford Law Book Co., 1940, page 195:

> "As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing. It, therefore, logically follows that if a statute enumerates the things upon

> which it is to operate, everything else must necessarily and by implication be excluded from its operation and effect."

The Supreme Court in the case of *Fullinwider v. Southern Pacific Railroad Company,* 248 U.S. 409, stated the rule as follows at page 412:

> "We grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it cannot be a substitute for a law. However, we do not find the uncertainty in Sections 9 or 23 that complainant does, whether jointly or separately considered. Section 23 is complete in itself. The restrictions upon the grant it made that were deemed appropriate were expressed, and their expression excludes any other by a well known rule of construction."

In the instant case, Congress, in enacting 10 U.S.C. 846, included certain express conditions which had to be met before a person was entitled to the benefits of the section. This statute has been amended or re-enacted many times over a period of many years. The conditions for entitlement under the statute have remained substantially unchanged during each of the occasions that the statute was enacted, re-enacted, or amended. It is presumed that Congress was aware of the fact that there have been American Prisoners of War in each war in which the United States has been involved who have committed acts which were disloyal to the United States. Yet, being aware of this fact, Congress, on each occasion that it re-enacted this section, did not see fit to condition the entitlement on the

conduct of the Prisoner of War. Therefore, it must be presumed that no such condition was intended to exist.

This Court, in the case of *Carter's Heirs v. Cutting*, 12 U.S. 250, at page 251, stated:

> "We cannot admit that construction to be a sound one, which seeks, by remote inference, to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent."

It is submitted that insofar as the rules of statutory construction are applicable to the instant case, the Court should follow the reasoning of *U. S. v. Chase*, 135 U.S. 255; at page 261, this Court held:

> "We recognize the value of the rule of construing statutes as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this Court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they involve the same mischief which the statute was designed to suppress."

And at page 262, the Court held:

> "Ashurst, J., said in Jones v. Smart, 1 TR 51: 'It is safer to adopt what the legislature have actually said than to suppose what they meant to say.' In the Queensborough cases, 1 Blight 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an act of Parliament, and not by the decision of court'."

If, as the lower court feels, the statute in its present form permits of evil and abuse, it should be amended or repealed, but such amending or repealing should be done by the legislature and not by the court.

If, in the instant case, the Army is permitted under the guise of statutory interpretation to legislate a condition of good conduct into 10 U.S.C. 846, then what is to preclude the Army from legislating a similar condition into any or all of the various other statutes which relate to military pay? This leads us into the second and more important aspect of the lower court's decision—the aspect of the effect the lower court's decision will have upon future servicemen.

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**AN ANALYSIS OF THE LOWER COURT'S OPINION.**

To determine the future effect of the lower court's decision, we must first analyze that decision.

**1. Administrative Forfeiture.**

The decision of the lower court authorizes the forfeiture of a soldier's pay by the unilateral administrative act of the Army.

The lower court held (R.P. 40):

> "The department, in denying plaintiff's claims which were filed with the department for pay,[5] necessarily determined under the provisions and

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[5]The procedural manner in which the Department of the Army unilaterally and administratively forfeited the plaintiffs' pay is spelled out and apparently approved by the lower court in Footnote No. 3 of its decision (R.P. 40).

> authority of the statute just quoted[6] that during the periods involved these plaintiffs did not have a status as prisoners, and were not entitled to pay under the quoted statutes."[7]

This holding by the lower court is contrary to all prior decisions relating to forfeiture of military pay.

In *Walsh v. The United States*, 43 Ct. Cl. 25, page 231, the Court of Claims held:

> "Aside from this, it has been held by this court in a number of cases that the mere fact that an officer or soldier is under charges, it does not deprive him of his pay and allowances, and such forfeiture can only be imposed by way of a lawful court-martial." (Citations omitted.)

The Court went on to say in the *Walsh* case:

> "As above stated, the uniform decisions of this court have been that it required the decision of a court-martial to deprive an officer of his pay and allowances."

See also *F. de Carrington v. The United States*, 46 Ct. Cl. 279.

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[6]The statute "just quoted" is 50 U.S.C. App. 1002 and 1009. It is interesting to note that the lower court completely ignores 10 U.S.C. 846 which does not give to the department any authority to determine anything.

[7]It should be borne in mind that Petitioners are seeking combat and regular pay which had accrued to them prior to capture, as well as pay after capture. (Supra, page 5). The respondent in its Brief in Opposition to the Petition for Certiorari, states at page 8: "Absent a statute which entitles them to pay, petitioners clearly have no right to pay for the period for which they sue." This is not accurate. Petitioners each had accrued pay "on the books" before their capture. This pay, though it could be paid under 10 U.S.C. 846 as pay due *on the day of capture*, is not dependent upon 10 U.S.C. 846 or upon 50 U.S.C. app. 1002.

Moreover, the more recent enactments of Congress have been to the effect that even a court-martial cannot forfeit accrued pay such as the plaintiffs are seeking in the instant case. (See Uniform Code of Military Justice, effective June 5, 1950, 64 Stat. 126, 50 U.S.C. 638.)

**2. Unconstitutional Forfeiture.**

The lower court's decision authorizes the Army to deprive a serviceman of his property without due process of law.

It is submitted that earned pay is a property right protected by the Fifth Amendment to the Constitution of the United States. In *U. S. Ex Rel. Innes v. Hiatt*, 141 F. 2d 664, the Third Circuit held:

> "An individual does not cease to be a person within the protection of the Fifth Amendment of the Constitution because he joined the Nation's Armed Forces and has taken the oath to support the Constitution with his life, if need be. The guarantee of the Fifth Amendment that: 'No person shall . . . be deprived of his life, liberty or property, without due process of law' makes no exception in the case of persons who are in the Armed Forces. The fact that the framers of the Amendment did not specifically except such persons from the guaranty of the right to a presentment or indictment by a grand jury, which is contained in the earlier part of the Amendment, makes it even clearer that persons in the Armed Forces were intended to have the benefit of the due process clause."

In the instant case, the pay which the petitioners have accrued or earned prior to their capture, and the pay which accrued to them after their capture, was taken from them by an administrative act of the Army, without hearing, without opportunity to be heard, without opportunity to call witnesses, and without any right to appear.

**3. Retroactive Forfeiture.**

The decision of the lower court makes the unilateral administrative forfeiture by the Army retroactive.

The Stipulation of Facts and the Findings of Fact give no dates as to when the alleged acts of misconduct commenced, save the one notation that the petitioner, Bell, became a monitor on January 1, 1951 (Findings of Fact, Paragraph 7 (R.P. 47)).

The lower court's ruling is that the alleged misconduct of petitioners in the latter stages of their confinement has the effect of causing a forfeiture of pay which accrued to them during the early period of captivity, in which it is not alleged that they misconducted themselves. It also has the effect of working a forfeiture of pay which they had earned prior to their capture.[8]

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[8]The respondent in its Brief in Opposition to the Petition for Certiorari states that this issue was not before the Court. This statement by the respondent is absurd. First, by their petition the petitioners asked for all pay due them on the day of their capture and on each day thereafter until the day of their discharge. As seen by the Defendant's Exhibits Nos. 6, 7 and 8 (R.P. 60, 61 and 62) to the Commissioner's Report, each of the Petitioners had pay due him on the day of his capture. Second, as seen in Footnote No. 3, page 14 of this brief, the amount of damages was fixed by an accounting made by the General Ac-

**4. Burden of Proof.**

The decision of the lower court imposes the burden of establishing lack of misconduct on the serviceman. The lower court's decision at page 43 of the record states:

> ". . . but this is a civil court in which plaintiffs must establish their right to affirmatively recover."

If the respondent were to try the petitioners in the Federal District Court for their alleged traitors' activities, as it is at liberty to do[9] and if it could get a

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counting Office and the defendant, and was supplied by the defendant to the plaintiffs. This accounting, which clearly showed on its face that the damages sought included combat and regular pay earned prior to capture, was made an exhibit to the Commissioner's Report by the defendant. As an exhibit admitted into evidence, this accounting was before the lower court. Third, the plaintiffs raised the issue of combat and regular pay accruing before capture in their opening brief (see Plaintiffs' Exceptions to Commissioner's Report and Plaintiffs' Brief, page 15) and in their oral argument to the Court.

[9]It should be noted that immediately after the Petitioners' return to the United States in July, 1955, the respondent sought to bring them to trial on the charge of Treason (Article 104, Uniform Code of Military Justice) before a court-martial. If the respondent had been successful in its attempt to try the Petitioners by court-martial, the Petitioners would have been denied many of their basic constitutional guaranties. (*Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, and *Kansella v. Drueger*, 354 U.S. 1.) However, the United States District Court for the Northern District of California ruled that the respondent, by its own act of giving the Petitioners Dishonorable Discharges, had lost its jurisdiction to try the Petitioners by court-martial (*Otho G. Bell, et al. v. Robert N. Young, et al.*, Nos. 34865, 34880 and 34881, United States District Court for the Northern District of California, Southern Division.) However, the effect of this ruling by the District Court was *not* that the Petitioners could not be tried for their alleged traitors' conduct, but was that if they were tried they had to be tried in a civilian court where they would enjoy their basic constitutional guaranties. The United States District Court in California had, and still has, jurisdiction to try the Petitioners on the charge of treason, or on other charges, for

jury to convict the petitioners, the District Court, in addition to other punishment, could fine the petitioners an amount in excess of the back-pay which they seek.[10] It is submitted that the respondent did not elect to try the petitioners in a civilian criminal court for the reason that in such a proceeding the burden would be on the respondent to prove the acts of misconduct. It is submitted that the respondent felt that it could not risk the opinions of civilian jurors on the question of "subtle brainwashing techniques". (Madden's Dissent, R.P. 45.) It is submitted that for this reason respondent adopted the "crude and primitive method of refusing to pay them their money" (Madden's Dissent, Record, page 46), thereby placing the burden on the petitioners of proving that they did not misconduct themselves. This burden of proof is not only significant, it is determinative of the petitioners' rights. As might be expected of persons of their rank, petitioners' personal assets are extremely meager. With the burden of proof on them, they are in the financially untenable position of having to call vast numbers of witnesses to establish that they are *not* guilty of misconduct. The cost of locating and producing such witnesses is impossible. The respondent, however, suffers from no such handicap. With its

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their conduct while prisoners of war in Korea. (See 18 U.S.C. 2381; 18 U.S.C. 3238; 18 U.S.C. 2387; 18 U.S.C. 2388.) However, the respondent did not see fit to indict the Petitioners in a civilian court. The only conclusion which can be reached from this inaction on the part of the respondent is that the respondent did not, and does not, have sufficient proof to convict the Petitioners, or even to bring them to trial before a civilian court with a civilian jury.

[10] 18 U.S.C.A. 2381, 2387 and 2388.

unlimited resources of finance and manpower,[11] respondent could easily produce any and all witnesses who might contribute even the slightest amount of relevant testimony. Such a situation is hardly conducive to equitable litigation.

**5. Standard of Care.**

The decision of the lower court fails to establish any standard of conduct or care.[12]

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[11]At the Commissioner's hearing, held at Monterey, California, on May 4, 1959, respondent produced witnesses from such divergent places as Washington, D.C., Atherton, California, and Denver, Colorado. One witness was called from Albuquerque, New Mexico, for the sole purpose of establishing the fact that conditions and treatment in Prisoners of War Camps were extremely harsh. The Petitioners stipulated to this fact. Another witness was called from Washington, D.C., for the sole purpose of establishing that the United States did not use germ warfare in Korea. The Petitioners stipulated to this fact.

In a letter dated March 14, 1957, addressed to the Honorable C. Murray Bernhardt, Commissioner, United States Court of Claims, respondent stated in part: "It is expected that the government will have a large number of witnesses who were in the service with plaintiffs during the Korean Conflict and during their incarceration as Prisoners of War. For the most part, these persons are no longer in the Army and it will take some time to ascertain their present locations and arrange to confer with them relative to their testifying in this case."

[12]The respondent, in its Brief in Opposition to the Petition for Certiorari, states at page 8: "To the best of our knowledge, this case is the first in the history of this country in which captured American soldiers have served an enemy of the United States and then sued for pay from the United States for the period in which they were doing so. Moreover, there are no other claims of this kind arising out of the Korean Conflict; and there is no prospect of similar claims in the foreseeable future."

This statement is true only because this is the first case since 1931 (*White v. United States*, infra) in which the respondent has refused to pay a serviceman what the statute allowed him. During each war in which the United States has become involved, there have been American prisoners of war who have misconducted themselves in a manner similar to that charged to your plaintiffs.

The lower court's decision is a civil ruling that makes good conduct a condition of entitlement of a serviceman to his pay. However, the lower court's decision wholly fails to establish any standard of conduct or standard of care. Is the standard to be a "reasonable man under the circumstances" type of standard? Is a standard to be based upon the conduct of the best soldier, the average soldier, or the least soldier? Is a standard to vary with rank? Is the colonel to be held to a higher standard than the private? Is a standard to be different dependent upon the type pay sought, the statute involved, or the "various provisions with respect to pay and allowances of officers and men of the Army, Navy and Marine Corps?" (*White v. United States*, infra.) Is the standard to be different in the different branches of the service, as was the

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During the Korean Conflict there was a high percentage of such misconduct, apparently because our enemies concentrated on this phase of warfare. Major William E. Mayer, an Army psychiatrist who spent 4 years studying "brainwashing" during the Korean conflict reports, in the February 24, 1956, issue of *U. S. News and World Report*, that:

> "About one-third of all the American Prisoners said they became something called 'progressives'. By the Communists' own definition, this meant that a man was either a Communist sympathizer or a collaborator, or both, during his stay in a Prison Camp."

There were many former Korean prisoners of war whom the Army tried by General Court Martial for violations of Article 104 and Article 105 of the Uniform Code of Military Justice. These men were convicted of conduct far more heinous than that which is charged to your plaintiffs. For example, see *U. S. v. Dickenson*, 17 C.M.R. 438; *U. S. v. Batchelor*, 19 C.M.R. 452; *U. S. v. Bayes*, 22 C.M.R. 487; *U. S. v. Gallagher*, 21 C.M.R. 435; *U. S. v. Olson*, 20 C.M.R. 461; *U. S. v. Major Ronald E. Alley*, 25 C.M.R. 63; and *U. S. v. Lt. Col. Harry Fleming*, 19 C.M.R. 438. Despite the fact that each of these accused was tried and convicted of the military equivalent of treason, each received all the pay and allowances which the statute allowed him.

case during the Korean Conflict?[13] In a case of continuing misconduct, what factor is to be used by the Court in determining when the conduct became sufficiently acute to work a forfeiture of pay?[14]

All of these, and many more, will be the questions asked by future generations of judges, lawyers, disbursing officers, and soldiers.

**6. Conclusive Administrative Determination.**

The decision of the lower court makes the unilateral administrative ruling by the Department of the Army conclusive. The lower court holds:

> "We held in the case of *Moreno v. United States*, 118 Ct. Cl. 30 (1950) that under the provisions of Section 1009, supra, of the Missing Persons Act, the department head was authorized to conclusively determine both the status and entitlement to pay under the act." (R.P. 42.)

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[13]The Army tried a number of its personnel under Articles 104 and 105 of the Uniform Code of Military Justice for their conduct while prisoners of war (see Footnote No. 12, supra). It is interesting to note that, though each of the other branches of the Armed Services had prisoners of war who misconducted themselves, no other branch of the service saw fit to bring any of its personnel to trial for such conduct. See for example the case of Col. Frank H. Schwable. The United States Marine Corps convened a Court of Inquiry on the Colonel and concluded that he was not responsible for his acts. See also the publication, *Facts on File, 1955*, page 191, where the conduct of various Air Force and Marine Corps officers is listed.

[14]As for example, in the instant case, the Petitioner, Bell, is alleged to have commenced his course of misconduct on January 1, 1951, one month after his capture. This misconduct consisted of leading a discussion group. The lower court does not specify whether it was this act or some subsequent act which fell below the hypothetical standard of conduct. The lower court simply lists various acts which occurred on unspecified days and forfeits the Petitioner's pay, whether or not it was earned or accrued prior to or after the commencement of the alleged acts of misconduct.

The lower court also states:

> "R. S. 1288, 10 U.S.C. Section 846, supra, was enacted in 1814. Numerous statutes have been enacted and committee reports made since that time. These latter statutes, including Sections 1002, 1006 and 1009, supra, of the legislation entitled the Missing Persons Act, as amended, cover the cases here presented. In fact, not only the language of the act itself, but committee reports at the time these sections were enacted clearly show that but for the Missing Persons Act there would be no basis of a claim for compensation." (R. P. 39.)

Therefore, presumably, the lower court is stating that the provisions of 50 U.S.C. App. 1009, relating to the conclusive nature of the administrative determination by the Department of the Army is also applicable to 10 U.S.C. 846. Thus, there is interpolated into 10 U.S.C. 846 three conditions, to-wit: Conduct, administrative determination, and conclusiveness. This interpolation of words into the act has the effect of completely denying the serviceman his day in court.

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**EFFECT ON FUTURE SERVICEMEN.**

Having thus analyzed the lower court's decision, what will be the effect upon future soldiers?

It is submitted that the lower court's decision places the serviceman in a very insecure and inequitable position. If the disbursing officer, or the commanding officer, or anyone else in the chain of command, uni-

laterally decides that a particular soldier has misconducted himself, he can forfeit that soldier's pay, retroactively, so as to include pay accruing prior to such misconduct. The soldier would be given no notice of such forfeiture, would not be entitled to call witnesses in his own defense, would have no right to confront or question his accusers, and would not be entitled to any type of hearing. In short, he would have to take the Army's word for it, that he was guilty of unspecified, or at least generalized, misconduct,[15] which occurred or commenced on unstated dates, which was sufficiently acute that it failed to meet an unknown standard of care and thus worked a retroactive forfeiture of his pay. If the serviceman is unhappy with the unilateral retroactive administrative decision, he could possibly file a claim in the Court of Claims. However, this would be questionable as the Court might find by interpolation that the unilateral administrative ruling by the Army was conclusive,[16] thereby

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[15]In the instant case when the Petitioners demanded their pay, they received the following response from the Department of the Army:

> "I have been advised that the following determinations have been made regarding the status of all U. S. Army voluntary nonrepatriates who elected not to accept repatriation to the United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:
>
> a. That all voluntary nonrepatriates who refused to elect repatriation to the United States and *their records as Prisoners of War*, adopted, adhered to, or supported the aims of Communism, one of which is the overthrow of all nonCommunist countries, including the government of the United States by force or violence." (Emphasis added; R.P. 40.)

It is hard to imagine a more generalized statement of misconduct.

[16]There is nothing in 10 U.S.C. 846 which makes the department's ruling conclusive, yet the lower court holds that the ruling of the Department of the Army is conclusive under 10 U.S.C. 846.

completely denying the serviceman his day in court. Assuming, however, that the serviceman is allowed to file his claim before the Court of Claims, he finds himself faced with insurmountable obstacles. He must employ counsel and provide that counsel with adequate funds to pay filing fees and printing costs, to investigate the case and to depose and produce witnesses. He must then bear the burden of proving he was not guilty of misconduct, against an adversary who has unlimited assets and manpower. When you couple these things with a delay of perhaps four years,[17] it is hard to imagine a more inequitable situation.

## CONCLUSION

It is respectfully submitted that on principles of both law and equity, the prior decision of the Court of Claims in *White v. United States* (1931), 72 Ct. Cl. 459, is a far better heritage to leave to our future servicemen.

> "The controller, I think, misconceived the true basis of the right to pay in the case mentioned. In the Navy, as in the Military Service, the right to compensation does not depend upon, nor is it controlled by, general principles of law; it does rest upon, and is governed by certain statutory provisions and regulations made in pursuance thereof which especially apply to such services. These fix the pay to which officers and men belonging to the

[17] In the instant case your Petitioners made their demand upon the Army for their pay on November 8, 1955. The Court of Claims ruled on the matter on March 2, 1960.

Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they actually perform services or not, unless their right thereto is forfeited or lost in some one of the methods prescribed in regulations averted to."

"It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all of the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigation should obtain to determine as a matter of fact whether the soldier had, by conscientious service, earned what the statutory provisions allowed him."

Respectfully submitted,

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*Attorney for Petitioners.*

**(Appendices A and B Follow.)**

## Appendix A

10 U.S.C. § 846 (1952) provides as follows:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. (R.S. § 1288.)"

## Appendix B

50 U.S.C. App. § 1002 (1952) provides as follows:

"Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credit to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein described: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period."

50 U.S.C. App. § 1006 (1952) provides as follows:

"When it is officially reported by the head of the department concerned that a person missing under the

conditions specified in section 2 of this Act [section 1002 of this Appendix] is alive and in the hands of a hostile force or is interned in a foreign country, the payments authorized by section 3 of this Act [section 1003 of this Appendix] are, subject to the provisions of section 2 of this Act [section 1002 of this Appendix], authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act [section 1005 of this Appendix], such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act [section 1002 of this Appendix] and payments of allotments, as provided in section 3 of this Act [section 1003 of this Appendix], are authorized to be continued, increased or initiated."

50 U.S.C. App. § 1009 (1952) provides as follows:

"The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1012 and 1013-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department

or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act [section 1005 of this Appendix] has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided,* That no such account

shall be charged or debited with any amount that any person in the hands of a hostile force may receive or be entitled to receive from, or have placed to his credit by, such hostile force as pay, wages, allowances, or other compensation: *Provided further,* That where the account of any person has been charged or debited with allotments paid pursuant to this Act [said sections] any amount so charged or debited shall be re-credited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act [section 1002 of this Appendix] to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act [sections 1001-1012 and 1013-1016 of this Appendix] or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evi-

dence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], except sections 13, 16, 17, and 18 [sections 1013 and 1016, and former sections 1017, 1018 of this Appendix], in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part."